



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for August 4, 2023

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BOARD DECISIONS

Appellant: Pere J. Jarboe

Agency: Department of Health & Human Services

Decision Number: [2023 MSPB 21](#)

Docket Number: CB-7521-21-0017-T-1

Issuance Date: August 1, 2023

Appeal Type: Constructive Removal

JURISDICTION

RES JUDICATA

CONSTRUCTIVE REMOVAL

ACTIONS AGAINST ALJs

The appellant is employed by the Department of Health and Human Services as an administrative law judge (ALJ). In 2020, the appellant filed a complaint with the Board alleging that the agency had constructively removed him, which he later withdrew. In 2021, the appellant filed another complaint alleging constructive removal. The agency filed a motion to dismiss the complaint, arguing that the Board lacked jurisdiction because the appellant was still employed by the agency, albeit on administrative leave, or, in the alternative, as barred by the doctrine of res judicata. The presiding official granted the

agency's motion and dismissed the complaint on both grounds. The appellant filed a petition for review.

Holding: A sitting ALJ may not bring a constructive removal complaint under 5 U.S.C. § 7521.

1. The Board acknowledged that its decision in *In re Doyle*, 29 M.S.P.R. 170 (1985), has been overruled by regulation and clarified that a sitting ALJ may not bring a constructive removal complaint under 5 U.S.C. § 7521.
2. In order to establish a constructive removal under 5 U.S.C. § 7521, the ALJ must have actually been separated or reassigned from the position of ALJ and must show that the decision to leave was involuntary under the same test for involuntariness applicable to constructive removal claims under 5 U.S.C. § 7512.
3. The Board affirmed the presiding official's finding that the Board lacks jurisdiction over the appellant's constructive removal complaint because he has not been reassigned or separated from his position and vacated the finding that the complaint is barred by res judicata.

Appellant: Pere J. Jarboe

Agency: Department of Health & Human Services

Decision Number: [2023 MSPB 22](#)

Docket Number: CB-7521-18-0009-T-1

Issuance Date: August 2, 2023

Appeal Type: Actions Against Administrative Law Judges (ALJs)

The agency employed the respondent as an ALJ since 2006. In January 2018, the agency filed a complaint with the Board seeking to remove the respondent. After holding a hearing on the agency's complaint, the Board's presiding ALJ issued an initial decision finding good cause for the respondent's removal and finding that the respondent failed to prove any of his affirmative defenses. The respondent filed a petition for review.

Holding: Under 5 U.S.C. § 7521, "the agency in which the [ALJ] is employed may take an action against the ALJ upon a finding of good cause by the Board."

1. The Board rejected the respondent's argument that the Office of Medicare Hearings and Appeals (OMHA) lacked delegated authority to seek his removal. The Board found that the complaint was properly filed by attorneys from the Department of Health and Human Services on behalf of that agency and its subagency, OMHA.
2. The Board reiterated its holding in *Social Security Agency v. Levinson*,

2023 MSPB 20, ¶¶ 37-38, that the Board's finding of good cause for removal of a respondent does not bind the employing agency to actually remove the respondent, but only authorizes the employing agency to remove the respondent. The Board declined to opine as to which agency official may exercise removal authority following the Board's good cause determination.

Holding: The Board's finding of good cause for an adverse action does not bind the agency to any particular penalty, but it merely authorizes it to do so.

1. The Board affirmed the presiding official's finding that the agency established good cause to remove the respondent.
2. The Board clarified that the employing agency retains discretion to take Board-approved action, impose a lesser sanction, or take no action at all.

Holding: The presiding ALJ properly denied the respondent's request for disqualification.

1. In determining whether an administrative judge or ALJ should be disqualified on grounds other than bias, the Board's policy is to follow the standard set out at 28 U.S.C. § 455(a): "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."
2. The Board found that the presiding ALJ did not abuse his discretion in denying the respondent's request for disqualification and his request to certify the disqualification issue for interlocutory appeal.